

rigorous, attempts not to supplement, but to supplant, OSHA's more discretionary regulation. In short, the result of ANSI's expertise in this area--which OSHA co-opted--was its conclusion that the "other" warning devices, which plaintiff alleges were required to render the forklift safe, actually may tend to create additional dangers in the workplace. That is a standard not the absence of a standard, and the state regulation urged by plaintiff, through the imposition of tort liability, would stand "as an obstacle to the accomplishment and execution of" the federal regulation regarding additional warning devices. *Geier, supra*, 529 U.S. at 881, 120 S. Ct. at 1925, 146 L. Ed. 2d at 932 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941)). Accordingly, we conclude that plaintiff's claim for damages based upon Komatsu's alleged failure to comply with a standard which conflicts with OSHA's standards was properly dismissed. [*Gonzalez, supra*, 371 N.J. Super. at 369-70 (alteration in original).]

Those conclusions fully accord with relevant conflict preemption principles in all respects. Although a state tort action involving a third party and a work place injury could survive an OSHA conflict analysis, this one simply does not. The judgment of the Appellate Division is therefore affirmed substantially for the reasons expressed in Judge Fisher's thorough and thoughtful opinion.

JUSTICE ZAZZALI dissenting.

I respectfully dissent from the majority's conclusion that regulations promulgated under the Occupational Safety and Health Act (Act), 29 U.S.C.A. §§651 to 678, preempt New Jersey products liability claims against a third-party forklift manufacturer. Instead, I would conclude that preemption is inapplicable in this appeal, and I would remand to allow plaintiffs to maintain their state law claims.

I.

Congress designed the Act to help guarantee that every American worker has "safe and healthful working conditions." 29 U.S.C.A. §651(b). To advance that objective, Congress empowered the Secretary of Labor to establish workplace safety and health regulations, 29 U.S.C.A. § 655, and created the Occupational Safety and Health Administration (OSHA) to enforce them, 29 U.S.C.A. §657. Because OSHA standards are wide-ranging and have the force of federal law, see, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 1714, 60 L. Ed.2d 208, 221 (1979), the vexing question that frequently arises is whether the regulations preempt state tort law.

Preemption principles are, at best, "difficult to apply," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868, 120 S. Ct. 1913, 1918, 146 L. Ed. 2d 914, 923 (2000), and, at worst, "of a Delphic nature," *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619, 78 S. Ct. 923, 924, 2 L. Ed.2d 1018, 1021 (1958). Furthermore, preemption "is not to be lightly presumed." *Turner v. First Union Nat'l Bank*, 162 N.J. 75, 88 (1999) (quoting *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 615 (1999)).

Here, the Court should not affirm the Appellate Division's finding of preemption for three reasons. First, by including a broad "saving clause," Congress intended any implied preemption of state tort claims by the Act to be extremely narrow. Second, state products liability law is generally applicable to all manufacturers and does not regulate employers and employees specifically. Third, imposing tort liability on a forklift manufacturer for defective design does not divest forklift users of their discretion to implement safety precautions, but rather encourages the exercise of that discretion with due care.

A.

Any preemption analysis relative to OSHA regulations must begin with the Act's saving clause, which provides:

Nothing in this chapter shall be construed to . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

[29 U.S.C.A. §653(b)(4).]

No other statutory framework that the Supreme Court has considered "contains a saving clause more broad." *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 687-88 (N.D. Ohio 2005) (observing that by selecting wording such as "affect in any other manner" and "injuries, diseases, or death," Congress "carefully preserved" personal injury claims); see also *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63, 123 S. Ct. 518, 520, 154 L. Ed.2d 466, 478 (2002) ("[A saving clause] assumes that there are some significant number of common-law liability cases to save" (citing *Geier*, *supra*, 529 U.S. at 868, 120 S. Ct. at 1918, 146 L. Ed. 2d at 923))

The majority opinion relies on the Supreme Court's decision in *Gade v. National Wastes Management Ass'n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992), for the proposition that "Congress intended for OSHA regulations to have a preemptive effect" in certain circumstances. *Ante* at 421, 877 A.2d at 1251. *Gade*, *supra*, however, is of limited value here because, in that case, a state legislature enacted a

licensing requirement in an affirmative and direct attempt to regulate the training of hazardous waste workers. 505 U.S. at 93, 112 S. Ct. at 2380, 120 L. Ed. 2d at 81. Stated differently, because the Gade licensing statute was "a positive enactment setting occupational standards," rather than a common law duty, the Act's "saving clause was virtually irrelevant to the Supreme Court's pre-emption analysis." *Welding Fume*, supra, 364 F. Supp. 2d at 687.

In contrast, the saving clause preserves the state tort claims at issue here because the clause specifically refers to "common law . . . rights, duties, or liabilities" regarding "injuries, diseases, or death of employees." 29 U.S.C.A. §653(b)(4). In light of Congress's clear statement, we should find preemption "only when there is a conflict between state tort law and federal regulation that is especially 'direct, clear and substantial.'" *Welding Fume*, supra, 364 F. Supp. 2d at 689 (emphasis added) (quoting *Gade*, supra, 505 U.S. at 107, 112 S. Ct. at 2387, 120 L. Ed. 2d at 90); see also *York v. Union Carbide Corp.*, 586 N.E.2d 861, 866 (Ind. Ct. App. 1992) (stating that because "state tort actions are expressly saved by the OSH Act," court would not even consider "whether such actions are impliedly preempted"). As explained more fully below, that high benchmark has not been reached in this appeal.

B.

The Court should not give OSHA forklift regulations preemptive effect because New Jersey products liability law is "general[ly] applicab[le]" to any person or business that manufactures and sells goods. See *Gade*, supra, 505 U.S. at 107, 112 S. Ct. at 2387, 120 L. Ed. 2d at 90. In *Gade*, the Supreme Court recognized that

state laws of general applicability (such as laws regarding traffic safety or fire safety)

that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be preempted. Although some laws of general applicability may have a "direct and substantial" effect on worker safety, they cannot fairly be characterized as "occupational" standards, because they regulate workers simply as members of the general public.

[Id. at 107, 112 S. Ct. at 2387-88, 120 L. Ed 2d at 90 (emphasis added).]

Products liability law is generally applicable because it imposes a duty on manufacturers to act reasonably in designing, testing, and marketing their products, see, e.g., *Fabian v. Minster Mach. Co.*, 258 N.J. Super. 261, 273-74 (App. Div. 1992), regardless of whether those products are ultimately used by employees in the workplace, see *Welding Fume*, *supra*, 364 F. Supp. 2d at 686. Such generally applicable "private rights and remedies . . . hardly qualify as standards" because they are "more ex post [and] reactive than prescriptive or normative." *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53 n.5 (1st Cir. 1991) (internal quotation marks omitted). Tort duties -- which the Act explicitly indicates are unaffected by OSHA regulations -- are established on a case-by-case, post hoc basis. Although the accretion of decisional precedent may have the potential to influence workplace behavior, such an effect does not set a standard or establish a regulation in the traditional sense. Accordingly, I would conclude that the OSHA forklift regulations do not preempt generally applicable state products liability law.

C.

Finally, preemption is inappropriate because OSHA's forklift regulations simply provide the forklift "user" with a range of discretion to select safety devices. Requiring the user, and by implication the manufacturer, to act reasonably in exercising that discretion is not a "direct, clear and substantial" interference with the regulations. *Gade, supra*, 505 U.S. at 107, 112 S. Ct. at 2387, 120 L. Ed. 2d at 90.

On this point, the majority relies heavily on *Geier, supra*, in which the Supreme Court held that products liability claims against auto manufacturers for failing to install airbags were preempted because "[s]uch a state law . . . by its terms would have required manufacturers of all similar cars to install air bags rather than other passive restraint systems." 529 U.S. at 881, 120 S. Ct. at 1925, 146 L. Ed. 2d at 932. However, *Geier* is distinguishable for two reasons.

First, the relevant saving clause in *Geier* was less specific than the saving clause in the Act. See *Welding Fume, supra*, 364 F. Supp 2d at 687 & n.21. The *Geier* saving clause provided that "'[c]ompliance with' a federal [auto] safety standard 'does not exempt any person from any liability under common law.'" *Geier, supra*, 529 U.S. at 868, 120 S. Ct. at 1918, 146 L. Ed. 2d at 923 (quoting 15 U.S.C. §1397(k)) (first alteration in original). In contrast, as noted above, the Act's saving clause speaks in far broader terms than whether "compliance" affects "liability": Congress was careful to warn that its intention was to leave common law duties and liabilities absolutely unchanged; not only would the OSH Act neither "enlarge [n]or diminish" the common law, but -- just in case there was some other way to modify tort law besides "enlarging or diminishing" it -- Congress further stipulated that the OSH Act would not "affect [the

common law] in any other manner." It is difficult to imagine a more explicit statement of Congressional intention to preserve and not pre-empt state common law.

[Welding Fume, *supra*, 364 F. Supp. 2d at 687-88 (emphasis added) (alteration in original) (quoting 29 U.S.C.A. §653(b)(4)).]

Second, the regulation in *Geier* was of a different nature than the forklift regulations in this matter. The *Geier* airbag regulation "deliberately sought a gradual phase-in of passive restraints" and any interference by state law "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier, supra*, 529 U.S. at 879, 881, 120 S. Ct. at 1924, 1925, 146 L. Ed. 2d at 930, 932. Thus, the airbag regulation implemented the Department of Transportation's industry-wide determination of the suitable ambient level of passenger safeguards. That determination, however, was not based on an assessment of the appropriate safety measures for each individual vehicle in light of particular road hazards.

OSHA's forklift regulations, on the other hand, provide the user with discretion to implement certain safety devices in order to protect against specific dangers present under various work conditions. A statement that accompanies the regulation explains that "the user [should] consider certain factors to enhance a safe operation. He may use his own judgment or that of one with more experience." *Gonzalez v. Ideal Tile Importing Co.*, 371 N.J. Super. 349, 369 (App. Div. 2004) (alteration in original) (quoting ANSI/ABME B56.1-1983, Interpretation 1-6). However, the statement also reveals that the regulation is by necessity incomplete: "The myriad combinations related to lighting, ambient noise levels, traffic routes for both materials and personnel, floor conditions, proximity of machinery, equipment and work stations, etc., suggest that this would

be a difficult subject to cover in a standard with finite verbiage." *Id.* at 370 (emphasis added) (quoting ANSI/ABME B56.1-1983, Interpretation 1-6). This intentional incompleteness, coupled with the Act's broad saving clause, suggests that general tort principles have a role to play in determining proper forklift safety precautions. See also S. Rep. No. 91-1282 (1970), reprinted in 1 970 U.S.C.C.A.N. 5177, 5186 (announcing that Act adheres to "principles of common law," that "individuals are obliged to refrain from action which cause harm to others," and that "employers shall furnish this degree of care").

For illustration, one conceivable alternative design that the forklift manufacturer might have considered would allow the user to easily install, remove, enable, or disable a variety of "other [safety] devices . . . suitable for the intended" jobsite. Gonzalez, *supra*, 371 N.J. Super. at 369 (quoting OSHA forklift regulations). In that way, the user could retain control over which safety devices are in use at given time and could reasonably respond to work conditions as they arose. At the same time, the forklift manufacturer could produce an adaptable, and ultimately safer, product. Guided by expert testimony, and taking into account the totality of the circumstances, a factfinder could decide whether the manufacturer's decision to forgo such a design was reasonable. Under the majority's holding, however, the regulations give the manufacturer unfettered and unreviewable discretion, a result that is contrary to traditional tort law principles and indifferent to employee safety.

II.

To be sure, the Appellate Division sets forth a creative argument, which the majority adopts, in favor of preemption on these facts. The dilemma is that, however appealing its reasoning may seem, the court's thesis rests on

distinguishable precedent, runs counter to the plain language of the Act, and conflicts with Congress's intent to allow common law actions to proceed except in the clearest cases.

Accordingly, I respectfully dissent and would reverse the Appellate Division's finding of preemption.

For affirmance - - Chief Justice PORITZ, Justices LONG, LaVECCHIA, ALBIN, WALLACE and RIVERA-SOTO - - 6.

For reversal - - Justice ZAZZALI - - 1.

N.J., 2005

Gonzalez v. Ideal Tile Importing Co., Inc.

184 N.J. 415, 877 A.2d 1247, 21 O.S.H. Cas (BNA) 1177

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4676-02T5

ARMANDO GONZALEZ and
MIRNA PADILLA GONZALEZ,

Plaintiffs-Appellants,

v.

IDEAL TILE IMPORTING CO., INC.,
and KOMATSU FORKLIFT, U.S.A., INC.,

Defendants-Respondents,

and

KALMAR AC OF COLUMBUS, INC.,
KALMAR-AC HANDLING SYSTEMS, INC.,
LIFT TRUCKS, INC., and HENSON
TRUCK & FORKLIFT SERVICE,

Defendants.

[ENTERED: JULY 22, 2004]

Argued May 11, 2004 - Decided July 22, 2004

Before Judges Coburn, Wells and C.S. Fisher.

On appeal from Superior Court of New
Jersey, Law Division, Monmouth County,
Docket No. MON-L-3124-99.

Edward F. Colrick argued the cause for appellants (McGovern, Provost & Colrick, attorneys; Mr. Colrick, of counsel and on the brief).

Wendy L. Mager argued the cause for respondent, Ideal Tile Importing Co., Inc. (Smith, Stratton, Wise, Heher & Brennan, attorneys; Ms. Mager, of counsel and on the brief).

Dennis P. Ziemba argued the cause for respondent Komatsu Forklift U.S.A., Inc. (Lavin, Coleman, O'Neil, Ricci, Finarelli & Gray, attorneys; William J. Ricci and Mr. Ziemba, of counsel; Messrs. Ricci and Ziemba, and Richard B. Wickersham, Jr., on the brief).

The opinion of the court was delivered by FISHER, J.A.D.

Plaintiff and his wife commenced this action, alleging a workplace injury. The trial judge granted both the summary judgment motion of defendant Ideal Tile Importing Co., Inc., finding plaintiff to be Ideal's employee and his claim barred by N.J.S.A. 34:15-8, and the summary judgment motion of defendant Komatsu Forklift, U.S.A., Inc., holding that claim preempted by federal law. We affirm.

I

Plaintiff claimed he was injured at his workplace when struck by one forklift and pinned against another. Ideal moved for summary judgment, asserting that plaintiff was an employee and his claim precluded by N.J.S.A. 34:15-

8, which generally renders an employee's workers' compensation claim the sole remedy against the employer. Wellenheider v. Rader, 49 N.J. 1, 9 (1967).

On February 1, 2001, the first judge assigned to the matter rendered an oral decision which unequivocally indicated that Ideal's motion for summary judgment would be denied in order to allow the parties to explore in discovery the fact disputes surrounding plaintiff's relationship with Ideal. Notwithstanding that ruling, the judge entered three orders - - one which denied Ideal's motion and allowed the parties to seek discovery on the employment issues, a second which granted Ideal's summary judgment motion, and the third, entered on February 16, 2001, which stated that plaintiff was not an employee of Ideal. Further confusion was generated a year later when Ideal moved again for summary judgment and sought reconsideration of the February 16, 2001 order. On March 22, 2002, the judge entered an order which granted reconsideration of the February 16, 2001 order without adequately explaining how the order was reconsidered or revised.

The case was later assigned to Judge Thomas W. Cavanagh, Jr. Ideal again moved for reconsideration and summary judgment. Judge Cavanagh granted both motions for reasons set forth in his December 17, 2002 oral decision. Plaintiff argues on appeal that reconsideration of the February 16, 2001 order was barred by the "law of the case" doctrine and, in any event, summary judgment was mistakenly entered in favor of Ideal. We disagree with both contentions.

Unquestionably, the prior orders were interlocutory because they did not resolve, either individually or collectively, all issues as to all parties. As a result, those orders remained "subject to revision at any time before the

entry of final judgment in the sound discretion of the court in the interest of justice." R. 4:42-2.¹ While the discretion to revisit an interlocutory order requires consideration of the law of the case doctrine, plaintiff's contentions appear to rest on the mistaken impression that this doctrine represents an absolute rule. While the law of the case doctrine reflects an important judicial policy that "once an issue is litigated and decided in a suit, relitigation of that issue should be avoided if possible," it is nevertheless a discretionary guideline. Sisler v. Gannett Co., Inc., 222 N.J. Super. 153, 159 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988). The respect and deference which should be given to prior rulings in the same case "must be balanced against other considerations, particularly the impact of new law or new facts," Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292, 302 (App. Div. 2004), or, we would add, where the confusing nature of the prior decisions requires clarification. In short, the law of the case doctrine does not obligate a judge to slavishly follow an erroneous or uncertain interlocutory ruling. See Cineas v. Mammone, 270 N.J. Super. 200, 207 (App. Div. 1994); McBride v. Minstar, Inc., 283 N.J. Super. 471, 481 (Law Div. 1994), aff'd o.b., 283 N.J. Super. 422 (App. Div.), certif. denied, 143 N.J. 319 (1995).

¹ Plaintiff argues, in part, that the February 16, 2001 order was a declaratory judgment and, therefore, final and appealable when entered. There is nothing, however, in plaintiff's complaint which would indicate that declaratory relief was sought, and there was no statement in the order of February 16, 2001 which would suggest that the judge thought he was entering a declaratory judgment. Moreover, plaintiff's reliance upon N.J.S.A. 2A:16-59, which states that "[a] declaratory judgment . . . shall have the force and effect of a final judgment," is misplaced. This statute does not convert a declaratory judgment, which resolves less than all issues as to all parties, into an appealable order, as the Court of Errors and Appeals explained long ago. Essex Foundry v. Biondella, 126 N.J.L. 157, 161 (E. & A. 1941).

In addition, Ideal correctly argues that an order denying summary judgment is not subject to the law of the case doctrine because it decides nothing and merely reserves issues for future disposition. See Franklin Med. Assocs. v. Newark Pub. Schools, 362 N.J. Super. 494, 512 (App. Div. 2003); Blunt v. Klapproth, 309 N.J. Super. 493, 504 (App. Div. 1998); ASP Sheet Metal Co., Inc. v. Edward Hansen, Inc., 140 N.J. Super. 566, 573 (Law Div. 1976). Accordingly, we reject plaintiff's contention that the first judge's orders regarding plaintiff's relationship to Ideal precluded Judge Cavanagh's consideration of Ideal's last motion for summary judgment.

We also subscribe to Judge Cavanagh's ruling that Ideal was plaintiff's employer and, thus, insulated from suit by N.J.S.A. 34:15-8, even though plaintiff was also an employee of EMI, which entered into a leasing agreement with Ideal. The undisputed facts presented by Ideal's summary judgment motion revealed that (1) plaintiff's work relationship was with Ideal only; (2) the work plaintiff performed was for Ideal's benefit; (3) plaintiff never received instructions from anyone other than Ideal representatives; (4) Ideal was the source of plaintiff's wages; and (5) Ideal had the power to hire and fire plaintiff. Judge Cavanagh correctly applied these undisputed facts to the legal principles contained in Volb v. G.E. Capital Corp., 139 N. J. 110, 116 (1995) and Kelly v. Geriatric and Med. Servs., Inc., 287 N.J. Super. 567, 573 (App. Div.), aff'd, 147 N.J. 42 (1996), in finding that plaintiff was an Ideal employee. We affirm substantially for the reasons set forth in his thorough and well-reasoned oral decision of December 17, 2002.

II

In considering Komatsu's motion for summary judgment, Judge Cavanagh correctly observed that plaintiff's only response to Komatsu's forty-two paragraph

statement of undisputed facts was his counsel's one-page conclusory and unsworn letter which stated, in its entirety:

The plaintiff takes exception with the defendant's list of undisputed facts in its entirety. The only undisputed fact that plaintiff believes is relevant here is that the plaintiff was severely injured as the result of the defendant's failure to design a lift truck with back-up warning devices and also its failure to communicate the availability of such devices to the end user.

With respect to the qualifications of plaintiff's expert, Mr. Niles expertly withstood two full days of grilling by defendant's attorney. Mr. Niles[s] credentials as a safety expert have been accepted in the many courts wherein he has given expert testimony over many years.

This general demurrer inadequately challenged Komatsu's detailed and annotated statement of material facts. See R. 4:46-2(b)(An opponent of a summary judgment motion "shall file a responding statement either admitting or disputing each of the facts in the movant's statement."); Housel v. Theodoridis, 314 N.J. Super. 597, 602 (App. Div. 1998).

In addition, since it was not a statement based upon personal knowledge, counsel's unsworn opposing letter was incapable of conveying any facts for summary judgment purposes. Even an attorney's sworn statement will have no bearing on a summary judgment motion when the attorney has no personal knowledge of the facts asserted. R. 4:46-5(a); Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 169 (App. Div. 1986); see also Inglett & Co. v. Everglades Fertilizer Co., 255 F.2d 342, 349 (5th Cir. 1958) ("[W]e think it

an unnatural, if not virtually impossible, task for counsel, in his own case, to drop his garments of advocacy and take on the somber garb of an objective fact-stater."'). Here, counsel did not even swear to, or certify, the "facts" he was attempting to convey through his letter in opposition to summary judgment. Accordingly, we agree with the judge's determination that Komatsu's R. 4:46-2(a) statement was undisputed.

Komatsu's statement of undisputed facts revealed that plaintiff sustained injuries from having been struck by a Kalmar Model C50 forklift operated in reverse by a coworker. Komatsu claims to have played a limited role in the production of the forklift. The factual record reveals an agreement among three parties regarding the production of forklifts. By way of this agreement, Komatsu agreed to supply another Japanese corporation, Nichimen Corporation, with certain forklift components. Nichimen promised to supply the Komatsu components, as well as its own additional components, to another party to the agreement, AC Handling Systems, Inc., an Ohio corporation,² which then manufactured, assembled and eventually sold the forklift to Lift Trucks, Inc., which apparently sold it to Ideal, plaintiff's employer.

In seeking summary judgment, Komatsu posed three arguments: (1) state tort claims for workplace injuries are preempted when the allegedly defective product was manufactured in compliance with federal regulations; (2) plaintiff's expert was not qualified to render an opinion about the design and manufacture of forklifts and, without expert testimony, plaintiff's claim could not succeed; and (3)

² AC Handling Systems, Inc. appears to have a relationship to defendant Kalmar-AC Handling Systems, Inc. (Kalmar), which has not been clarified by the record on appeal. Plaintiff's claim against Kalmar was dismissed without prejudice by way of a stipulation executed by counsel on February 5, 2003.

Komatsu, as a supplier of component parts, could have no liability for the absence of the safety devices which plaintiff claimed were required. Judge Cavanagh discussed all these issues in his oral decision but expressly declined to determine whether the second or third arguments warranted the entry of summary judgment, ruling instead that federal preemption barred the claim.

Komatsu's preemption argument requires that we first consider the purpose of the federal law which, according to Komatsu, preempts plaintiff's claim. Congress enacted the Occupational Safety and Health Act (the OSH Act), 29 U.S.C.A. § 651 to § 678, to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C.A. § 651(b). In pursuing those goals, Congress authorized the Secretary of Labor to promulgate health and safety standards for workplaces, 29 U.S.C.A. § 655, and established the Occupational Safety and Health Administration (OSHA) to enforce those standards through inspections and investigations, 29 U.S.C.A. § 657. The OSH Act requires employers to comply with specific OSHA standards and also imposes a general duty on employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C.A. § 654(a). Violators of specific OSHA standards or OSHA's general duty to provide a safe workplace face civil monetary penalties, as well as criminal sanctions, 29 U.S.C.A. § 666.

In considering the impact of OSHA's regulations upon the manufacture of forklifts, we initially observe that neither party has argued that the OSH Act applies only to "employers," 29 U.S.C.A. § 652, and, for that reason, may not govern Komatsu's involvement in the production of forklifts. See McKinnon v. Skil Corp., 638 F.2d 270, 275 (1st Cir. 1981). Certainly, if the OSH Act does not apply to the

manufacturer of a product supplied to a workplace regulated by OSHA, then the product manufacturer's federal preemption defense would fail; a claim cannot be federally preempted in the absence of federally-imposed duties and obligations. However, in this appeal, we need not determine OSHA's reach because both parties have proceeded on the assumption that Komatsu was bound by OSHA's forklift standards. Both parties accept the premise that OSHA's standards govern product manufacturers; their only dispute is whether OSHA's standards permit state supplementation or whether OSHA's standards constitute the sole standard by which plaintiff's claim against Komatsu must be assessed. Since plaintiff has abandoned, by not raising, an argument that federal preemption cannot attach to a regulation which does not bind a product manufacturer, we assume without deciding, since Komatsu concedes, that OSHA's forklift regulations are binding on Komatsu and not just informative or evidential of the standard of care applicable to a manufacturer or seller.³

The Secretary of Labor adopted a regulation which states that "[a]ll new powered industrial trucks acquired and used by an employer . . . shall meet the design and construction requirements for powered industrial trucks established in the 'American National Standard for Powered Industrial Trucks,'" 29 C.F.R. §1910.178(a)(2). Among these ANSI standards is the requirement that forklifts "be equipped with an operator controlled horn, whistle, gong,

³ Even if not binding, the OSHA regulation could potentially be admitted in evidence to shed light on the manufacturer's standard of care. See Costantino v. Ventriglia, 324 N.J. Super. 437, 442 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000); Kane v. Hartz Mountain, 278 N.J. Super. 129, 141-42 (App. Div. 1994), aff'd o.b., 143 N.J. 141 (1996); Smith v. Kris-Bal Realty, Inc., 242 N.J. Super. 346, 352 (App. Div. 1990); Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 69 (App. Div. 1986).

or other sound-producing device(s)." These regulations, however, do not require inclusion of an "automatic audible alarm," "an automatic flashing light of some sort," or "a system of mirrors" which plaintiff's expert claims were necessary to render this forklift a safe product. Instead, ANSI indicates that "other devices (visible or audible) suitable for the intended area of use may be installed when requested by the user." Plaintiff argues that these ANSI standards create only a floor, or a minimum safety standard, and the failure of the ANSI standard to require additional warning devices - - the absence of which has led his expert to conclude that the forklift was an unsafe product - - allows this area to be regulated by the States.

In considering whether this product liability action - - a type of state regulation⁴ - - is preempted by federal law, we are required to recognize that, by way of the OSH Act, Congress brought the federal government "into a field that traditionally had been occupied by the States." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96, 112 S. Ct. 2374, 2382, 120 L. Ed. 2d 73, 83 (1992) (plurality opinion of four justices). As a result, Komatsu's argument that it is bound only to comply with OSHA regulations, and cannot be put to some greater or different state standard, requires that we examine the intent of Congress, "the ultimate touchstone" in such matters. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S. Ct. 1904, 1910, 85 L. Ed. 2d 206, 214 (1985). Since federal preemption "has grown from little

⁴ State regulation "can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521, 112 S. Ct. 2608, 2620, 120 L. Ed. 2d 407, 426 (1992) (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775, 784 (1959)).

more than a blip on the radar screen to one of the most powerful defenses in all of products liability law," David G. Owen, Federal Preemption of Products Liability Claims, 55 S.C.L.Rev. 411, 412 (2003), the guiding principles which have accumulated - - principles which have been greatly criticized, id. at 412-13, and viewed by some critics as "highly politicized," Scott A. Smith & Duana Grage, Federal Preemption of State Products Liability Actions, 27 Wm. Mitchell L.Rev. 391, 415 (2000) - - instruct that federal preemption may arise in a number of ways.

The Supreme Court has explained that preemption may be expressed or implied, and that implied preemption comes in two types - - field preemption and conflict preemption. Expressed preemption is determined from an examination of the explicit language employed by Congress. Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604, 613-14 (1977). The two types of implied preemption have been described in the following way:

[F]ield pre-emption [is] where the scheme of federal regulation "'is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" and conflict preemption [is] where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

[Gade, supra, 505 U.S. at 98, 112 S. Ct. at 2383, 120 L. Ed. 2d at 84 (citations omitted).]

As our own Supreme Court has held, these three categories are "anything but analytically air-tight." R.F. v.

Abbott Labs., 162 N.J. 596, 618 (2000) (quoting Laurence H. Tribe, American Constitutional Law, Vol. I, § 6-28 (3rd ed. 2000)). Instead, the process of determining whether federal law preempts state law "is a fact-sensitive endeavor, based on a court's review of "fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation." R.F., supra, at 619 (quoting Erwin Chemerinsky, Constitutional Law: Principles and Policies, § 5.2 (1997)).⁵

In examining the language of the applicable statutes and the purposes of the OSH Act, we also must presume that "Congress did not intend to displace state law," Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 2129, 68 L. Ed. 2d 576, 595 (1981), particularly where, as here, the field which Congress is said to have preempted has been traditionally occupied by the States, Jones v. Rath Packing Co., supra, 430 U.S. at 525, 97 L. Ed. 2d at 1309, 51 L. Ed. 2d at 613. In short, preemption "is not to be lightly presumed," Turner v. First Union Nat'l Bank, 162 N.J. 75, 88 (1999).

It has also been determined that expressed preemption, field preemption and conflict preemption are not mutually exclusive. The Supreme Court recently observed that there are circumstances where field or conflict preemption will be found to bar state regulation even though the explicit language of a statute purports to save state regulation from preemption. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869, 120 S. Ct. 1913, 1919, 146 L. Ed. 2d 914, 924 (2000) ("[T]he saving clause (like the express pre-

⁵ Administrative regulations, when authorized by statute, have the same preemptive effect as federal statutes. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54, 102 S. Ct. 3014, 3022-23, 73 L. Ed. 2d 664, 675 (1982), which is ascertained in the same manner. R.F., supra, 162 N.J. at 619.

emption provision) does not bar the ordinary working of conflict pre-emption principles.").

Ascertaining the intent of Congress, for present purposes, requires that we consider two statutes, the first of which states:

Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

[29 U.S.C.A. § 653(b)(4).]

The great majority of federal courts have concluded that this statute reveals the intent of Congress to save from preemption the existing state rights and remedies which employees possess against their employers, including any state tort claims. See Pedraza v. Shell Oil Co., 942 F.2d 48, 53-54 (1st Cir. 1991), cert. denied, 502 U.S. 1082, 112 S. Ct. 993, 117 L. Ed. 2d 154 (1992); Frohlick Crane Serv., Inc. v. Occupational Safety and Health Review Comm., 521 F.2d 628, 631 (10th Cir. 1975); Wickham v. Am. Tokyo Kasei, Inc., 927 F. Supp. 293, 294 (N.D. Ill. 1996); Startz v. Tom Martin Constr. Co., Inc., 823 F. Supp. 501, 505 (N.D. 111. 1993); York v. Union Carbide Corp., 585 N.E.2d 861, 866 (Ind. App. 1992); Dukes v. Sirius Constr., Inc., 73 P.3d 781, 791-92 (Mont. 2003); Note, The Extent of OSHA Preemption of State Hazard Reporting Requirements, 88 Colum. L. Rev. 630, 641 (1988); see also Millison v. E.I. du Pont de Nemours and Co., 226 N.J. Super. 572, 594 (App. Div. 1988) ("OSHA regulations were intended neither to create nor to destroy

common law rights and liabilities of employers or employees arising out of employment."), *aff'd*, 115 N.J. 252 (1989). In addition, it has been held that 29 U.S.C.A. § 653(b)(4) not only saves from preemption state law claims which an employee may possess against an employer but also the employee's tort claims against others as well. As the Court of Appeals for the First Circuit concluded, it is highly unlikely that, by expressly preserving state law claims against employers in 29 U.S.C.A. § 653(b)(4), Congress decided to silently preempt "the right of an employee to bring an action for damages against a third-party supplier of products used in the workplace." *Pedraza*, 942 F.2d at 54 n.6.⁶ For these reasons, we agree with *Pedraza* that 29 U.S.C.A. § 653(b)(4) saves from preemption not only claims against employers but also claims against others whose products are supplied to employers for use in the workplace.

In short, from the existence of the savings clause, 29 U.S.C.A. § 653(b)(4), we are persuaded that Congress believed "there are some significant number of common-law liability cases to save." *Geier, supra*, 529 U.S. at 868, 120 S. Ct. at 1918, 146 L. Ed. 2d at 923. This does not, however, end the inquiry into whether plaintiff's claim against Komatsu may be considered preempted. What the savings clause allows may be taken away by what the preemption clause precludes.

⁶ Similarly, in determining whether the Atomic Energy Act, 42 U.S.C.A. § 2011 to § 2281, preempted state claims for compensatory and punitive damages, the Supreme Court held that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 104 S. Ct. 615, 623, 78 L. Ed. 2d 443, 454 (1984). See also *Cipollone, supra*, 505 U.S. at 520, 112 S. Ct. at 2619, 120 L. Ed. 2d at 425.

OSHA's preemption clause, 29 U.S.C.A. § 667(a), states that "[n]othing in this [Act] shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect." On its face, this preemption clause directs that the state actions saved from preemption by U.S.C.A. § 653(b)(4) are those in which a state provides standards other than those established by federal law. In considering the give-and-take of such savings and preemption clauses, the Supreme Court concluded that an analogous preemption clause should be read narrowly:

Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes

common-law actions. Given the presence of the saving clause, we conclude that the preemption clause must be so read.

[*Geier*, *supra*, 529 U.S. at 868, 120 S. Ct. at 1918, 146 L. Ed. 2d at 923.]

For these same reasons, we also conclude that 29 U.S.C.A. § 653(b)(4), in general, saves state tort actions from being preempted by 29 U.S.C.A. § 667(a).⁷

This, however, does not necessarily mean that preemption may not be found through a consideration of field preemption and conflict preemption principles. *Geier* instructs that these other principles should be considered, even when the express statutory provisions preserve state law tort remedies. 529 U.S. at 869, 120 S. Ct. at 1919, 146 L. Ed. 2d at 924. We conclude, essentially for the same reasons which prompted our conclusion that 29 U.S.C.A. § 653(b)(4) saves state tort law from preemption, that Congress has not pervasively regulated the field and left no room for state supplementation of the standards which govern workplace safety. Thus, field preemption does not apply to bar plaintiff's claim herein.

Ascertaining whether conflict preemption applies is a more difficult matter. Our decision is complicated by the inability of a majority of the members of the Supreme Court to reach an agreement, in *Gade*, as to the OSH Act's consequences for state tort law. While it is true that a

⁷ While the Court's opinion in *Geier* concerned provisions contained in the National Traffic and Motor Vehicle Act, 15 U.S.C.A. § 1381 to § 1431, and not the OSH Act, and while the savings and preemption clauses in that Act contain differences from those contained in the OSH Act, we are persuaded that the same analysis should be applied here.

majority of five justices agreed that the OSH Act preempted an Illinois statute which required the licensing of hazardous waste equipment operators and laborers, a holding which is quite distinct and, thus, does not control the arguments presented herein, those five justices could not agree on whether preemption was expressed or implied. In her plurality opinion, Justice O'Connor expressed her view, and the view of three other members of the Court, which lies at the heart of Komatsu's position, and Judge Cavanagh's holding, that conflict preemption provisions require a finding of federal preemption:

The design of [the OSH Act demonstrates] that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards.

....

[T]he natural implication of [29 U.S.C.A. § 667 (a)] is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard.

[Gade, *supra*, 505 U.S. at 99-100, 112 S. Ct. at 2383-84, 120 L. Ed. 2d at 84.]

If this was the standard by which we should examine whether plaintiff's claim against Komatsu was preempted, we would agree with Komatsu that any alternative state standard regarding forklift warning devices, even if purely supplemental, would conflict with the ANSI standards

incorporated by OSHA. However, Justice O'Connor's broad description of conflict preemption constituted a minority view. Four other justices dissented from the Court's judgment, and a fifth. Justice Kennedy, concurred in the judgment but disagreed with this aspect of Justice O'Connor's opinion, stating:

I do not believe that supplementary state regulation of an occupational safety and health issue can be said to create the sort of actual conflict required by our decisions. The purpose of state supplementary regulation, like the federal standards promulgated by [OSHA], is to protect worker safety and health. Any potential tension between a scheme of federal regulation of the workplace and a concurrent supplementary state scheme would not, in my view, rise to the level of "actual conflict" described in our preemption cases.

[*Id.* at 110-11, 112 *S. Ct.* at 2389, 120 *L. Ed.* 2d at 92 (concurring opinion).]

Thus, the theory of preemption espoused by Komatsu was not adopted by a majority of the Court in *Gade*,⁸ and whether a state may permissibly supplement a federal standard was left for another day. The Supreme Court's subsequent decision in *Geier* gives some insight into this unresolved question.

In considering the precise limits of the OSH Act's preemption of state regulation, and whether the OSH Act permits supplementation of OSHA regulations, *Geier*

⁸ We find inexplicable the failure of plaintiff and Komatsu to cite *Gade* in their briefs.

demonstrates, in its consideration of similar questions in an unrelated area of manufacturing, the importance of the principles of conflict preemption. Conflict preemption requires a close examination of both the intent of the federal regulation and the purpose of the questioned state regulation. Put in context, OSHA's preemption clause, 29 U.S.C.A. § 667(a), directs that OSHA does not "prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect." Stated another way, this preemption clause means that States may not assert jurisdiction over any occupational safety or health issue which is governed by a federal standard. Despite the preemption clause's central theme that non-conflicting standards may be enforced, the more difficult question posed by plaintiff, and which was not resolved by Gade, concerns the validity of state regulation which is only supplemental to federal regulations, i.e., does the federal standard regarding forklift warning devices merely set forth a minimum safety standard, and, if so, may a more expansive state standard be imposed?

In Geier, the Court considered this problem in the context of federal regulation regarding automobile airbags. The Court explained the long history of federal attempts to render the use of automobiles more safe by requiring the installation of seatbelts and passive restraints of various sorts. In weighing the advantages and disadvantages of restraint systems, the Department of Transportation adopted a regulation which required manufacturers to equip some but not all 1987 vehicles with passive restraints. In seeking damages, Geier claimed that an automobile manufacturer, who was in compliance with the DOT standard, should have equipped the automobile in question with airbags. Id. at 864, 120 S. Ct. at 1916-17, 146 L. Ed. 2d at 921-22. The Court determined that the regulation "deliberately sought a gradual phase-in of passive

restraints," requiring manufacturers to equip only 10% of their car fleet manufactured after a certain date with passive restraints, with the intention to increase that percentage in three annual stages, until all vehicles were so equipped by a later date. Id. at 879, 120 S. Ct. at 1924, 146 L. Ed. 2d at 930. As a result, the Court concluded that the claim that a complying manufacturer should have equipped a particular automobile with an airbag was in conflict with the gradual phase-in mandated by federal regulation. In other words, at the time in question, the federal regulation was 10% mandatory and 90% optional. This did not mean that 10% was a floor above which a state could regulate; instead, making installation of airbags optional for 90% of the vehicles was also a federal standard which could not be altered by state regulation. In this way, Geier illuminates the manner in which we should examine the ANSI forklift standards and the preemption controversy raised in this appeal.

Upon examining the content of the ANSI standards, and their intended meaning, we conclude that plaintiff's product liability theory suggests a standard that is in direct conflict, and not merely supplemental, to the ANSI standards. Two ANSI standards demonstrate this conflict. The first requires that forklifts be equipped with an operator controlled horn, while the second declares that "other devices (visible or audible) suitable for the intended area of use may be installed when requested by the user." As can be seen, ANSI does not leave open an area where the States may regulate with regard to "other" warning devices. Instead, like the phased-in airbag regulation considered in Geier, ANSI specifically creates a standard for "other" warning devices, requiring the user to determine their need, dependent upon the "intended area of use."

ANSI's interpretation of these standards⁹ demonstrates that OSHA requires that such additional warning devices should not be installed absent a contrary determination by the user:

[T]he user [should] consider certain factors to enhance a safe operation. He may use his own judgement or that of one with more experience.

The myriad combinations related to lighting, ambient noise levels, traffic routes for both materials and personnel, floor conditions, proximity of machinery, equipment and work stations, etc., suggest that this would be a difficult subject to cover in a standard with finite verbiage.

The support for using additional audio and/or visual alarms is that it may promote safety. The argument against indiscriminate use of additional alarms is that it might encourage the driver to ignore his responsibility of looking in the direction of travel and being alert to impending danger. Also, automatic continuous alarms can become so commonplace that they will soon be ignored by persons in the area.

[ANSI/ASME B56.1-1983, Interpretation 1-6.]

⁹ ANSI's interpretation of its own standards is entitled to considerable deference. *Geier, supra*, 529 U.S. at 883, 120 S. Ct. at 1926, 146 L. Ed. 2d at 933. By adopting ANSI's standards, we assume it was also the intent of the Secretary of Labor to have those standards mean the same thing which ANSI intended.

As can be seen, the ANSI standards do not merely set a mandatory minimum for forklift safety devices, but regulate the universe of warning devices, concluding that the inclusion of warning devices other than an operator-controlled horn, may tend to create more dangers than they prevent and, thus, should depend upon the conditions in which the forklift is used, as determined by the owner/user. Plaintiff urges application of a product liability standard regarding "other" warning devices that, by being more rigorous, attempts not to supplement, but to supplant, OSHA's more discretionary regulation. In short, the result of ANSI's expertise in this area - - which OSHA coopted - - was its conclusion that the "other" warning devices, which plaintiff alleges were required to render the forklift safe, actually may tend to create additional dangers in the workplace. That is a standard, not the absence of a standard, and the state regulation urged by plaintiff, through the imposition of tort liability, would stand "as an obstacle to the accomplishment and execution of" the federal regulation regarding additional warning devices. Geier, supra, 529 U.S. at 881, 120 S. Ct. at 1925, 146 L. Ed. 2d at 932 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941)). Accordingly, we conclude that plaintiff's claim for damages based upon Komatsu's alleged failure to comply with a standard which conflicts with OSHA's standards was properly dismissed.

Affirmed.

COBURN, J. A. D., dissenting.

Although I agree with the majority's opinion affirming the judgment in favor of defendant Ideal Tile Importing Co., Inc., I respectfully dissent from the affirmance of the judgment in favor of defendant Komatsu Forklift, U.S.A., Inc.

In McKinnon v. Skil Corp., 638 F.2d 270, 275 (1st Cir. 1981), the court held that OSHA only applies to employers and not to third-party tort claims. That point was reiterated in Pedraza v. Shell Oil Co., 942 F.2d 48, 52-54 (1st Cir. 1991), cert. denied, 502 U.S. 1082, 112 S. Ct. 993, 117 L. Ed. 2d 154 (1992). I agree with those cases, and therefore believe that Komatsu's preemption argument is without merit.

I disagree with the majority's suggestion that plaintiffs have accepted the premise that OSHA's standards govern product manufacturers because they failed to argue that OSHA applies only to employers. Instead, I believe that plaintiffs' position in this regard is clearly inferable from their argument that OSHA does not preempt third-party tort claims.

Although I would reverse the judgment in favor of Komatsu, I would remand the case for determination of the other points raised by Komatsu but left undecided by the trial court.

Docket No.: A-4676-02T5

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION - CIVIL PART
DOCKET NO.: MON-L-3124-99

ARMANDO GONZALEZ and
MIRNA P. GONZALEZ,

Plaintiffs,

IDEAL TILE IMPORTING CO., INC., et al.

Defendants

TRANSCRIPT
OF
DECISION

Held at: Monmouth County Courthouse
71 Monument Park
Freehold, New Jersey

Heard on: January 29, 2003

BEFORE:

THE HONORABLE THOMAS W. CAVANAGH, JR.,
J.S.C.

TRANSCRIPT ORDERED BY:

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THE COURT: In the matter of Gonzalez versus Ideal Tile Importing Company, Docket Number L-3124-99, I heard oral argument on a notice of motion for summary judgment filed by Komatsu Forklift on January 17th. Now, so that there's no confusion in the record, that was not a motion date. But I scheduled it on that date as a result of the pending trial call, which had previously been scheduled on January 27th.

Therefore, although the motion was originally scheduled on the 10th, I spoke to counsel about some additional items that I wanted submitted. Carried it until the 17th. Oral argument took place on the 17th. During which time I also took some oral testimony not having to do with this motion, but having to do with the position of Kalmar, the only other remaining defendant.

It's my understanding that Kalmar and the plaintiff have worked out a resolution of that claim. Although I have not seen the order yet. Therefore, the only viable remaining defendant at the time of the motion was Komatsu Forklift, USA, Inc. Previously, I had signed an order allowing Ideal Tile out of the case on a summary judgment.

Now, the moving party, Komatsu, filed a statement of undisputed facts as it is required to do under Rule 4:46-2. Those facts are as follows. And I should indicate at the outset that there are some 42 paragraphs. And I should also indicate at the outset that the extent of the opposition filed

to those facts is a statement in the plaintiff's letter brief of January 10th, I'm sorry, it's a letter that's dated December 9th, but the Court didn't receive until January 10th. I don't know exactly why, but it is the only opposition that I did receive.

That document authored by Mr. Colrick contains the following language. "The plaintiff takes exception with the defendant's list of undisputed fact in its entirety. The only undisputed fact that plaintiff believes is relevant here is that the plaintiff was severely injured as a result of the defendant's failure to design a lift truck with backup warning devices. And also, its failure to communicate the availability of such devices to the end user."

Under Rule 4:46-2, specifically section B, the rule provides as follows. "A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to Rule 4:46-5A all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph A demonstrating the existence of a genuine issue as to the fact.

"An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record."

The plaintiff in opposition to the motion did not file a statement of facts of its own. Whether it be entitled to a cross statement or sufficient to say perhaps even counter statement, there is no statement.

Secondly, it is my understanding of the intent of the rule that where the undisputed facts are properly placed before the Court and there are citations referenced therein, in other words, the source of the fact is presented properly as is required by the A section of the rule. The opponent of the motion does not have the option of summarizing the work done by the moving party in the 42 paragraphs with concomitant references in a single sentence, which simply indicates that the plaintiff takes exception to all the facts.

That type of response flies in the face of the language in the rule which requires that they be deemed admitted unless specifically disputed by citation conforming to the requirements of paragraph A. And that's in the B section.

So, my initial finding in this case and in this motion is that the plaintiff has failed to properly address its task as it relates to the facts. And therefore, the facts as given to me by the moving party for the purposes of this motion are undisputed. And in essence deemed admitted and will be included by the Court in my ultimate conclusions as set forth in the statement.

And having said that and assessing the procedural situation, the facts are as follows. The case arises out of a forklift accident which occurred at the Ideal Tile warehouse in Howell, New Jersey in June of 1997. The plaintiff allegedly sustained injuries when he was struck by a Kalmar model C50 forklift operated in reverse by Samuel Geltz, a coworker. Mr. Geitz was untrained and unauthorized to operate forklifts. And operated it for at least 50 feet in reverse toward Mr. Gonzalez, the plaintiff, leading up to the accident.

A witness, a George Eberhart (phonetic), I'm sorry, at the deposition of George Eberhart, who was a witness to the incident, indicates that Mr. Eberhart Mr. Geitz approaching

on the forklift. And Mr. Eberhart testified that Mr. Gonzalez, Mr. Geitz and he were engaged in a discussion.

At the time of the manufacture and sale of the forklift Komatsu and Kalmar were engaged in what is called an OEM agreement. Komatsu supplied Nichiman (phonetic) with certain component, excluding components, - - strike that. Komatsu supplied Nichiman with certain components for a forklift, but not components such as, counterweights, overhead guard, forks, low back rests, final paint, seats and engine covers.

Nichiman in turn supplied. Kalmar AC Handling systems with forklift component parts among other components, counterweights, guards, forks, low back rests, final paint, seats and engine covers. Kalmar then manufactured, assembled and sold the forklift to Lift Trucks, Inc. in September of 1988.

And just to pause for a moment, counsel brought a diagram to oral argument which demonstrated in essence what the structure that Komatsu built looked like. And in essence it was essentially the skeletal essence of the forklift, but perhaps it would be more accurate to say the skeletal cab of the forklift.

Now, the Occupational Safety and Health Administration according to 29 CFR 1910.178 does not require a manufacturer to equip its lift trucks with alarms, lights, mirrors, or mirrors at the time of manufacture. The American National Standards Institute expressly vests in the so-called end user the right to determine whether its operating conditions do or do not necessitate such equipment. And that's cited to, the citation there is the expert report, as well as, the actual regulations themselves.

The American National Standards Institute expressly vests in the so-called end user the right to determine whether operating conditions do or do not necessitate equipment, again, with a concomitant cite to the code of federal regulations.

Plaintiff's designated expert, Ernest Niles, in his deposition agreed that the end user is in the best position to determine whether optional equipment will be effective in a given environment. And that deposition was provided to the Court and the reference is pages 389 and 390.

And the answer that comes from the expert is, "Basically what you're trying to say is that the end user knows more about where the truck is going to be used. And therefore, is better equipped to request a backup alarm if he knows that backup alarms are important to prevent accidents."

Q "But your answer to my question then would be -
- A That the end user is best able to determine whether the safeguard that he has been" sold, -- I'm sorry, is told, "has been told, TOLD, is necessary to protect the operator, to protect the pedestrian, plural, pedestrians. What kind of safeguard is necessary. Yes."

And then the question goes on.

"The subject forklift was manufactured and sold as a completed product in compliance with applicable industry standards." And again, there's a citation there that indicates that such was conceded by the plaintiff's expert during the first part of his deposition at pages 141 through 142.

And here is the question. "You will agree, so we're crystal clear, that this product as sold complied fully with the requirements of the B56.1 standard in 1983 and very one

since then as it relates to the approach to having optional automatic signaling devices on forklifts."

Answer from plaintiff's expert, "Yes, I'll agree that it agrees with the wording of the standard."

And I'm going on, "Komatsu never had any direct involvement with Ideal Tile, the end user of the forklift."

Now, on a somewhat different topic, there are additional facts which reference Mr. Niles capacity to act as a defendant, as an expert for the plaintiff, strike defendant. And those facts are as follows. Mr. Hiles is not an expert in the design of Kalmar AC model C5OLP forklifts such as the one at issue. He is not a forklift design engineer, nor an industrial engineer, nor a sound engineer. Nor has he ever worked for a forklift manufacturer. Nor has he ever been asked by a forklift manufacturer to participate in or consult on the design of any production forklift or forklift component.

He is not and never has been a certified forklift operator. And he has never had, I'm sorry, he is not and has never been a certified forklift operator trainer. He has done no testing of a variable decibel alarm, whose average range is at least 85 decibels to determine that its potential effectiveness in warehouse environments and suitability on forklifts. He's done no testing to determine the appropriate candle power for his proposed strobe light or flashing light.

He opines that any and every forklift in the category of the subject forklift that does not include his proposed design concept is defective. And no national union requires audible alarms, lights or mirrors as standard equipment. No professional organization has ever taken the position that alarms, lights or mirrors should be required as standard equipment on forklifts.

Mr. Niles has not submitted his opinions to any individual or organization for peer review. He has not read a single deposition which the parties conducted in this case. He has conducted no visibility measurements from the operator's position in the subject forklift. He did not inspect the Ideal Tile warehouse where the accident occurred, nor measured the lighting or the noise levels in the Ideal Tile warehouse.

He conducted no human factors analysis to assess potential reactions Co or the effectiveness of the signaling devices in the workplace. Nor has he any idea how far away the subject forklift was when the operator started to travel in reverse. He does not know how far the forklift traveled while in reverse. Nor has he any idea how fast the subject forklift was traveling at any point up to impact.

Mr. Niles does not know if the operator attempted to steer the forklift in any direction. Nor did he make any effort to determine plaintiff's specific orientation relative to the oncoming forklift.

And finally, he conceded that if Mr. Gonzalez and Mr. Geitz were speaking prior to the accident, then there would be no need for his proposed alternative design. And that again comes from his deposition at page 376, which is also included by reference in the facts.

In fact, the precise testimony involved is as follows at page 375. After the question is asked his answer is, "It would change the opinion that Mr. Gonzalez did not know the truck was coming and thereby, would indicate the backup alarm or the lights would not be needed. It would indicate that if I'm standing and seeing you running into me, I don't have to know that, you don't have to have

backup alarms and lights letting me know that you're coming, because I'm looking at you. I don't think the accident would have happened."

He also at this point in the deposition, I'm sorry, not at this point, but at page 389 confirms my earlier reference given to me by the moving party about the end user.

Q "Would you agree that the end user is in the best position to know whether an audible alarm would be heard in a particular environment? A I thought I had answered that. The end user and the end seller, who should know where it's going to be sold, would certainly know more than the manufacturer or any of the earlier sellers as to what level alarm sound should be included, yes."

So, that is confirmation of a fact that I read into the record somewhat earlier on. Now, many of the latter facts that the Court recently placed in the record involving Mr. Niles' background and his conduct in examining the facts would probably generate the necessity of a 104 hearing at the time of trial. And some of those factors would probably be appropriate cross-examination questions.

The determination of whether or not the global consequence of all of those issues militating against Mr. Niles would disqualify him from testimony becomes an issue that the Court does not have to resolve in total, because of the other issue raised by the moving party having to do with the preemption question.

Now, as to the statement of the case and the legal argument presented, clearly Komatsu is a component manufacturer. There was limited involvement with the subject forklift and it terminated well before the truck's eventual sale to Ideal Tile. The Court finds that to be a fact. The chain of title here goes from Komatsu to Nichiman,

Nichiman to Kalmar and Kalmar onto the dealer, Lift Trucks, Inc. And ultimately, it was delivered to Ideal Tile in 1989.

Now, the issue of the responsibility of a component manufacturer is not resolved by simply concluding that the defendant in question is a component manufacturer, at least since the pronouncement in *MICHALKO*, the *COOKE COLOR AND CHEMICAL CORP.*, 81, New Jersey 386. That case, of course, involved a rebuilding of a machine. And it was in essence a retrofit as opposed to an original manufacture.

But the principle involved would carry forward in that the independent contractor component assembler who undertakes to rebuild part of a machine in accordance with the specs of the owner, can still be held strictly liable under our Products Liability Act if there's a breach of the duty to the machine's foreseeable users to make the machine safe and to warn of the dangers inherent in its use. I note that only in passing.

The plaintiff's contend in this case that the essence of the responsibility even if Komatsu qualified, would be the failure to include within the ultimate forklift an audible automatic alarm, flashing lights and mirror system as standard equipment.

The basic position of the moving party is that that conclusion offered by Mr. Niles, even if it were determined that he was competent as an expert in the field, would conflict directly with pertinent ANSI standards and OSHA regulations. And as a result, that claim as broken down by Mr. Niles would be preempted by federal law.

They additionally argue that because Komatsu is a mere component part manufacturer, but not the manufacturer of the completed product, that plaintiff should not be able to maintain their cause of action. And thirdly, even if they overcame and by they I mean the plaintiffs, if they overcame those burdens, there is a lack of competent reliable admissible expert testimony regarding defects in the design of the forklift. And how those alleged defects proximately caused the injuries. And therefore, for any or all of those three reasons Komatsu is entitled to a summary judgment.

Now, initially the standard of review is, of course, well documented and well known to all lawyers and Judges. And most recently our Supreme Court, -- when I say, most recently, I guess most recently of the cases that we rely on. Most recently the Supreme Court has spoken in *BRILL* versus *GUARDIAN LIFE*, which was written in 1995 and is contained at 142, New Jersey, 520.

There the Court indicated the determination of whether a genuine issue of material fact exists requires the Court to consider whether the competent evidential materials presented when viewed in the light most favorable to the non moving party are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non moving party.

There are a host of other citations in the moving party brief affixing the duty on the party resisting to come forward with controverting facts. And as *BRILL* said, a non moving party cannot defeat a summary judgment motion merely by pointing to any fact in dispute. The primary moving vehicle here is the preemption argument, which of course, is a legal argument predicated upon facts that I have already indicated are in the record and undisputed.

Now, addressing the legal position of the parties, —

(Tape off - Tape on)

The seminal opinion relied upon by the moving party on the preemption issue is the United States Supreme Court case GEYER versus AMERICAN HONDA MOTOR COMPANY, which is set out at 529, U.S., 861, 120 (Supreme Court, 1913). And it is a 2000 decision, although the Court acknowledges that there were four dissenters from a majority opinion. However, the majority opinion dealt with the preemption issue as it applied in that particular lawsuit.

The plaintiff, then petitioner, was injured in an accident while driving an 1987 Honda that did not have passive restraints. The plaintiff and her parents sought damages under the District of Columbia tort law claiming Honda was negligent in not equipping the Accord with a driver's side air bag. The majority ISconsidered the fact that the District Court granted summary judgment because the claims expressed were preempted by the Act.

And the Court of Appeals affirmed indicating that petitioner's state tort claims posed an obstacle to the accomplishment of the objectives of the federal Motor Vehicle Safety Standard Act. And those claims, therefore, were preempted under ordinary preemption principles. The majority of the Court affirmed that determination and essentially held that the no air bag lawsuit conflicts with the objectives of the federal statute. And is therefore, preempted by the Act.

There was some discussion as to whether or not the Act's preemption provision expressly preempted the lawsuit. But ultimately concluded that the presence of a saving clause which says that compliance with a federal safety standard does not exempt any person from any

liability under common law, requires that the preemption provision be read narrowly to preempt only State statutes and regulations.

Since the clause assumes there are a significant number of common law liability cases to save, and therefore, reading the preemption provision to exclude common law tort actions gives actual meaning to the saving clause's literal language, the Court concluded that the claim was preempted.

Interestingly, our Supreme Court considered a very similar argument in *LEWIS versus AMERICAN CYANAMID COMPANY* at 155, New Jersey, 544, a 1998 decision, which involved a products liability action. That action was brought about when the plaintiff was burned in an explosion while he was using foggers manufactured by one codefendant and sold by another. He brought a series of claims, issue oriented claims. Failure to warn, manufacturing defect, design defect, et cetera.

The Law Division dismissed plaintiff's failure to warn claim holding it was preempted by the Federal Insecticide, Fungicide and Rovinci (phonetic) Act. A jury rejected plaintiff's claims regarding manufacturing defect, but awarded him damages on the design defect claim. And the Court affirmed the Appellate Division's decision to dismiss plaintiff's a failure to warn claim, but also reversed the entry of judgment notwithstanding the verdict. They remanded for a retrial on the issues of comparative fault, defendant's liability, but not on the issue of damages.

As to the preemption question, the Court, our Supreme Court concluded that although the plaintiff contended that the fogger's label was inadequate because it did not contain a warning regarding flammability, that as a registered-insecticide product the language on the fogger's

label was determined by FIFRA, acronym for the Act I've read in before, and related regulations promulgated by the Environmental Protection Agency, the EPA.

In short, federal law determines the contents of the warning on the fogger's label. FIFRA contains an expressed provision, I'm sorry, an expressed preemption provision prohibiting a State from imposing additional or different labeling requirements.

Now, the moving party also produced as legal authority an unpublished opinion by the Appellate Division from 1996, which it is asserted substantially references the argument offered and also, supports the preemption argument referenced in the prior cases.

Now, Rule 1:36-3 discusses unpublished opinions and indicates no unpublished opinion shall constitute precedent or be binding upon any Court. Except for Appellate opinions not approved for publication that have been reported in an authorized administrative law report and except to the extent required by res judicata and other principles, no unpublished opinion shall be cited by any Court.

It also indicates no unpublished opinion shall be cited to the Court unless all parties are served with a copy. That did happen here. And by the language in the rule in my understanding unpublished opinions I cannot rely upon the contents as precedential, however, the opinions may be submitted as secondary research to the Court and both parties. In that sense while it may be instructive, it is not authority or the ultimate holding.

By way of commentary I would note that the opinion in question references the preemption question in a case that involved the utilization of that doctrine in connection with a somewhat similar incident.

Let me correct the record. I believe I said it was a 1996 decision. It's not. It's a May 2002 decision. And the moving party supplied it to the Court, and the resisting party secured the lower Court opinion from Judge Boggia in Bergen County.

So, purely and simply the case involved an employee of one of the defendants. He was injured when he was struck by one of the lift trucks. The truck didn't have a backup alarm. He indicated that he didn't realize the truck was too close until too late. The suit was brought against the manufacturer.

And the allegation was there was an absence of a backup alarm which contributed to the plaintiff's injuries. The lower Court in granting a summary judgment in a written opinion relied upon GEYER. And indicated that State common law product liability claims are preempted if they conflict with the safety standard promulgated under federal law.

The Judge went on to say, Crown designed and manufactured the lift truck in question according to the engineering and safety principles of the American National Standard Institute, ANSI, as was done here. And the Occupational Safety and Health Administration, OSHA, which adopted those principles here and there.

Under those standards Crown was not obligated to equip its lift trucks with a backup alarm. Alternatively, Crown gives the buyers of the lift trucks, including this buyer in this case, the option to have the alarm installed.

This choice given to the end user is in accord with ANSI standards. The rationale being that the actual user is best able to assess the environment and determine whether backup alarms are necessary. And that is, of course, the same precise argument that is made here.

The argument presented by the plaintiff there was that the standard is silent as to Crown's obligation to install a backup alarm. And since the regulation does not specifically address the issue, plaintiff says there is no conflict. Judge Boggia concluded that Crown constructed the truck in accordance with ANSI and OSHA regulations. Crown was not required under ANSI B56.1, as is asserted here, to install a backup alarm. And decided the user of the truck would be best equipped.

The federal regulation determines whether to include a backup alarm and determines that a manufacturer is not negligent if he does not include one. Thus, the claim of negligence is preempted. That case was affirmed by the Appellate Division citing GEYER, as well as, several other cases in New Jersey. Particularly, MIRANDA at 27.6, N.J. Super., 20 at pages 25 and 26, an App. Div. case from 1994, which was published and where cert, was denied in 138, New Jersey, at page 271.

And they quote from MIRANDA saying preemption of State law by a federal statute arises from the Federal Supremacy Clause, U.S. Constitution, Article 6, Clause 2. The focus of analysis is on the intent of Congress. Preemption may be explicitly dealt with by the statute. Preemption may also be inferred where Congress indicates an intent to occupy a field to the exclusion of State law. Even where Congress has not fully occupied a field, state law is preempted when it actually conflicts with federal law.

That is, if it is impossible to comply with both state and federal law or when state law is an obstacle to the accomplishment or the full purposes and objectives of Congress. And that is a New Jersey published case which asserts that conclusion. The Appellate Division considered the issues and determined that Judge Boggia was correct and that the matter was preempted.

Now, again, I don't cite that case as authority, but only by way of instruction and it is corroborative of the case law that I have referenced that is published, MIRANDA, GEYER, LEWIS, all of those are New Jersey cases.

Now, in November the Appellate Division wrote BEADLING versus WILLIAM BOWMAN ASSOCIATES. It "was approved for publication in November. And in reading through it, not that long ago, somewhat similar issues were raised both as to the net opinion of the expert and the placing of labels in certain locations on top of the drums that were involved in violation of ANSI standards.

In essence they argued, the plaintiffs, it would have been desirable and appropriate to affix additional warnings to the side of the drum. And there was reference to the ANSI regulation which provided certain specific direction. The Court analyzed a variety of federal references and also, the history of the preemption doctrine. Indicating that it's rooted in the clause I've already referenced of the Constitution. As long as the agency intended to preempt state law and acted within the scope of its delegated authority, federal regulations will displace conflicting state laws.

Now, in this case the Court distinguished the situation and concluded that neither OSHA, nor the HCS is intended to preempt the inappropriate placement of a warning by either a distributor or manufacturer. If there is

no direct conflict, which they found there not to be, it is not necessarily preempted. They held that while they didn't pass on the reasonableness of plaintiff's position, the Court was satisfied that a requirement which calls for the placement of a warning label on the side of a 45 gallon drum is not physically impossible under OSHA or the HCS. Nor would it stand as an obstacle to accomplishing and executing Congress' purpose in enacting OSHA.

It also determined that they were not persuaded that the, FHSE preempted plaintiff's action, because it was limited to household products.

Now, the significance of this case is two-fold. One, it acknowledges the applicability of the preemption doctrine. And two, the Court distinguished this matter from some of the others by saying, the federal regulations that they examined in that case did not speak specifically to the location of the warning. And neither expressly preempt, nor conflict with the applicable ANSI standards respecting the appropriate placement or durability of the warning on drums used in an industrial environment.

Because the federal regulations did not speak to the issue under consideration here, the Court essentially concluded there was no preemption. That that was a factually based determination which resulted from consideration of the particular area, to wit, the location of the labels.

Now, continuing with the legal argument against the backdrop that I've just presented, take me off.

(tape off - tape on)

THE COURT: Now, the factual position of the moving party here, as I say, set against the legal authority

that I've already put in the record is that the design and equipping of forklifts, both of those are governed by industry standards. That the American National Standards Institute promulgated ANSI B56.1 to govern forklifts.

The standards are drafted, reviewed and periodically revised by an expert committee comprised of lift truck manufacturers and users, government representatives, academics, insurance interests and independent engineering consultants. Those standards involve state of art determinations in lift truck safety.

All forklifts used in the workplace in the United states must pursuant to federal law, OSHA, 29 CFR 1910.178 be designed and manufactured in compliance with ASME/ANSI B56.1 national safety standards. Neither ANSI nor OSHA requires a manufacturer to equip its lift truck with alarms, lights or mirrors at the time of manufacture.

Specifically, the federal citation provides under OSHA, "All new powered industrial trucks acquired and used by an employer shall meet the design and construction requirements for power industrial trucks established by ANSI for powered industrial trucks."

ANSI B56.1 provides, 7.31, "warning devices, 7.31.1, every truck shall be equipped with an operator controlled horn, whistle, gong or other sound producing device. 7.31.2, In addition, other devices visible or audible suitable for the intended area of use may be installed when requested by the user." And the reference there is attached Exhibit F, which is the ANSI standard, which is of course, located at 7.31.

And the Court referenced that language therein. And there is no contention that that language is not appropriately referenced.

That reference is contained at page 35 of the exhibit. It is accurately set forth in the brief. Clearly, the plaintiff cannot argue that the reference does not directly speak to warning devices on the truck in question.

There's also a reference from the expert engaged by the defendant who concludes at page 3, that in accordance with that reference, additional backup alarms, other than what was provided and what was contained here on the truck, and warning lights are not necessary to make the Kalmar AC model C50LP forklift safe.

"Applicable federal regulations and industry standards do not require the installation of backup alarms or strobe lights as standard equipment. The decision on whether or not to include additional backup warning devices is properly left to the judgment of the end user, who is the best position to evaluate their environment of use."

And that factor was conceded, as I indicated before, by Mr. Niles, the plaintiff's expert.

The defendant continues that the standard referenced immediately preceding this portion of the argument expressly vests in the so-called end user the right to determine whether its operating conditions do or do not necessitate such equipment. And again, Mr. Niles has conceded that. And I've placed those references into evidence. And I find them as part of the evidential background that I'm utilizing to reach my conclusion. I acknowledge them and I accept them as offered, and I find them to be facts which I rely upon.

Going further, Mr. Niles also conceded in the portion of his deposition I read before, that the forklift herein involved was sold completely, -- I'm sorry, was sold by Komatsu while fully complying with the requirements of

B56.1, the standard in 1983, and every one since then as it relates to the approach of having optional automatic signaling devices on the forklifts. And Mr. Niles said, I agree with that. It agrees with the wording of the standard.

Dr. Caulfield, again, the defendant's expert, confirms in his report on page 2 that yes, Mr. Niles' concession is correct. When he says based on an analysis of the operating characteristics, et cetera, all of the materials, the regulations, the literature, the manuals, the warnings, et cetera, the forklift met all applicable standards. It is not defective or unreasonably dangerous and is safe for proper and intended uses as designed and manufactured.

Therefore, the Court concludes that the vehicle that Komatsu placed into the stream of commerce by selling a portion of the final product to Kalmar was in full compliance with the ANSI regulations as adopted into federal law. I also conclude that the specific question of additional warning devices, which would include strobe lights and the other suggestion by Dr. Niles or Mr. Niles, would specifically be addressed and it is addressed, they are addressed in 7.31.2.

So, the first two prongs of the preemption question are answered quite easily. There is a federal law. It speaks directly to the issue in question. And it indicates that the machinery was proper when Komatsu released it in that it complied with all appropriate federal standards. As a result of that conclusion, the plaintiff's assertion of liability cannot be sustained.

In essence, the plaintiff seeks to affix on a component manufacturer an obligation that is not only not imposed on them by federal statute and regulations, but in essence it

seeks to impose a responsibility on Komatsu that is specifically directed to be the province of the end user. And there is no argument that Komatsu is not the end user.

So, there's direct reference to the issue. The regulation apportions the responsibility elsewhere. The plaintiff's expert concedes that the component portion complied with all federal standards when it was released by Komatsu. And yet, argues that somehow the preemption doctrine, which the Court has placed in the record, should not apply.

There is commentary also in the argument from the committee report in connection with interpretation of ANSI B56.1 which includes language that says, "The support for using additional audio and/or visual alarms is that it may promote safety. The argument against indiscriminate use of additional alarms is that it might encourage the driver to ignore his responsibility of looking in the direction of travel and being alert to impending danger. Also, automatic continuous alarms can become so commonplace that they will soon be ignored by persons in the area."

They also say in the committee report, "The myriad of combination related to lighting, ambient noise levels, traffic routes for both materials and personnel, floor conditions, proximity of machinery, equipment and work stations, et cetera, suggest that this would be a difficult subject to cover in a standard with finite verbiage."

Clearly the committee's purpose is to underscore the responsibility belongs to the end user, because the end user is best prepared and most knowledgeable of the conditions involved. That is the philosophy of the committee. That is the intent of the regulation and that is what is conceded by plaintiff's expert to be the appropriate method in that the end user has the capacity to make the most informed choice.

Ideal Tile at any time could have purchased optional equipment for the subject lift truck either when it purchased the equipment or when it came to their premises. Therefore, without addressing the other elements, the Court determines that the preemption argument is a compelling argument.

Now, the plaintiff argues in its responsive papers that a forklift is defective because it was, when it's designed and marketed without backup warning devices. And there's an argument presented about pedestrians and, safety, et cetera. There is no dispute by the plaintiff that the fundamental responsibility set forth in the ANSI regulations adopted into federal law as met. The argument becomes one of additional responsibility.

Again, the argument offered that spec changes may be made in the OEN agreement unilaterally by Komatsu would be sufficient to create a basis to deny the motion under our case law, MICHALKO versus COOKE COLOR AND CHEMICAL CORP., 91, New Jersey, 3 86 and other cases, if, if the component manufacturer breached a duty to foreseeable users to make the machine safe or to warn of dangers inherent in the use.

There is no evidence in the case that Komatsu did any of these things. There is no evidence in this case, in fact, there is overwhelming evidence to the contrary that when the component manufacturer relinquished responsibility, over the vehicle that it conformed in all ways with federal regulations. Which I've already placed in the record and which were directly specifically tied to the issue raised here, -- additional backup alarms.

So that the arguments offered for the most part in this response are not terribly relevant. I would concur that a component manufacturer under the restatement may be

responsible. And I would deny the motion for summary judgment if not for the preemption argument. Let me correct that. Aid things being equal and not taking into account the other arguments, if I evaluated this case simply on the basis of whether or not a component manufacturer could be held liable, I would certainly find that the answer is yes, if the criteria is met.

However, whether or not the component manufacturer can be held liable is determined by whether or not it placed the machinery in the stream of commerce that was somehow dangerous to foreseeable users. And that standard has here been preempted by federal statute and through the ANSI regulation. Clearly, the statute speaks to the issue in this matter.

Now, there was some argument offered that because Judge Boggia concluded that the alternative, in his decision he says the alternative of additional standards was set forth as an option. In other words, I think his exact language was, "This choice given to the end user is in accordance with ANSI standards." And the prior sentence, "Alternatively, Crown gives the buyers of its lift truck, including KDC, the option to have the alarm installed."

The suggestion was by counsel that that somehow generates a responsibility on the part of the plaintiff, I'm sorry, on the part of the defendant to undertake some task that wasn't undertaken here. That's not what the regulation says. The option is available. There's no testimony that Komatsu, the component manufacturer, did anything to foreclose that option. There is no testimony or proof before me that Komatsu failed to do anything that the ANSI and CFR require as it relates to additional alarms, strobe lights, et cetera.

As a result, the plaintiff's expert concluded, again, that the vehicle in skeletal form was released in compliance with ANSI regulations. Now, the argument that there's an ongoing relationship and this effectuates some sort of a duty as of yet not specifically defined would fly in the face of the concession by Mr. Niles. Or in testimony that he would offer that somehow they violated those regulations at a later time. None of that is suggested here.

The Court cannot discern how the intent here of the federal agencies was not to speak to the issue exactly as suggested by the moving party. It is clear and direct. It is not a situation, such as the recent Appellate Division case that I placed in the record before, BEADLING, where the regulations didn't speak to the location of the labels.

Here, the direction is given. There are requirements, a fundamental requirement, and additional requirements are the responsibility and province of the end user. It's a direct and specific reference. It would be straining logic and the English language to argue anything other than that this directive is herein cogent and binding.

There is in front of me essentially no meaningful response to the defendant's motion. And I find no basis upon which to deny their motion. The preemption issue clearly precludes the claims that are brought as to additional devices.

Interestingly, Mr. Niles apparently concedes that if the facts before me were correct and that the driver was speaking to the injured employee, then his opinion wouldn't really be persuasive or compelling. Because then there would be notice that the truck is backing up, which was what he based his conclusion on factually. By that concession he may undercut the factual basis, but I'm not going to get into that.

As he says in his report, "The moving truck was equipped with only the steering wheel horn in accordance with the minimum requirements for such a truck." So, he concedes they met the requirement. "There were no automatically actuated audible backup alarms, nor any visual warning lights incorporated in the original design and manufacture of the truck. None were provided or recommended through any selling or furnishing this truck for an area where it would, could, should be known and expected by them that a mix of pedestrian workers and truck traffic would exist. Presently all four trucks in the warehouse have both a flashing light and a backup alarm."

Well, frankly that determination was made by the end user, the employer. And would have been made in accordance with the regulations by that end user. The report provides no basis for avoiding the preemption doctrine. And I hold that the claims as encompassed in the plaintiff's product liability suit against Komatsu are preempted by federal law for the reasons that I've placed on the record.

* * *

CERTIFICATION

I, CHRISTINE URENA, Certified Agency Transcriber, do hereby certify that the foregoing transcript of proceedings on Tape No. CV-33-02, Index No. 0910 to 6G18 is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the decision as recorded in the matter of Armando Gonzalez and Mirna P. Gonzalez versus Ideal Tile Importing Co., Inc. heard by the Monmouth County Superior Court on January 29, 2003.

/s/ Christine Urena

CHRISTINE URENA

TERRY GRIBBEN'S TRANSCRIPTION SERVICE

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AOC Number

3/25/03

Docket No.: A-4676-02T5

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION - CIVIL PART
DOCKET NO.: MON-L-3124-99

ARMANDO GONZALEZ and
MIRNA P. GONZALEZ,

Plaintiffs,

-vs-

IDEAL TILE IMPORTING CO., INC., et al,

Defendants

TRANSCRIPT
OF
DECISION

Held at: Monmouth County Courthouse
71 Monument Park
Freehold, New Jersey

Heard on: January 30, 2003

B E F O R E:

THE HONORABLE THOMAS W. CAVANAGH, JR.,
J.S.C.

TRANSCRIPT ORDERED BY:

DENNIS P. ZIEMBA, ESQ.
(Lavin, Coleraan, O'Neil, Finarelli & Gray)

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THE COURT: In order to finish my comments on the Gonzalez matter, I began yesterday, Docket Number L-3124-99.

The moving party asserted several reasons for granting a summary judgment. The Court has already ruled that the claim herein detailed was preempted. The second area, as well as, the third area essentially becomes moot as a result of the Court's ruling.

However, by way of commentary the Court would note that although I'm not going to rule on that issue, because I need not, the statement of facts submitted by the moving party beginning at paragraph 21, I'm sorry, paragraph 18 and concluding at paragraph 39, I'm sorry, at paragraph 42, as I originally indicated, highlights the fact that there is a severe question presented regarding Mr. Niles' expert opinion.

And there is no argument offered by the plaintiff contesting the assertion by the defendant that the liability herein for a design defect must come at least at the outset by way of expert analysis. There are additionally other criteria that will be reviewed in determining whether or not the opinion passes muster. But it is commonly agreed that in a design defect case the plaintiff bears the burden of going forward with the evidence and the persuasion that Decision the product contained a defect.

The plaintiff must educe sufficient evidence on the risk utility factors, et cetera, *ROBERTS v RICH FOODS*, 139, New Jersey, 365. As an example of the responsibility to produce a prima facie case, the plaintiff is required in a strict liability design defect case to provide the support of admissible expert testimony argues the defendant and cites *RIDENOUR versus BAT EM OUT*, 309, Super., 634.

Although the Court, again, is not going to resolve this issue, I have looked at the facts between paragraphs 18 and 42. And while I conclude that some of them may well be cross-examination material, there is a substantial question presented as to whether or not those facts as admitted would render the testimony of the expert herein to be inadmissible.

The Appellate Division recently authored a case titled *SWANEZ versus EGLAND*, 353, N.J. Super., 191, wherein the Court considered the opinion of an expert and concluded that there must be a causal relationship between reliable scientific literature and enumerated other consequences in that particular case. Basically, the issue was whether there was a reliable scientific foundation for purported expert opinion by a biomechanical engineer that a low impact automobile accident cannot cause herniated disc. And the Court after careful consideration determined that the testimony was inappropriate.

Now, here I have not evaluated all of the criteria set forth within the various paragraphs, but certainly a distinct issue is raised as to whether or not the defendant has the necessary scientific background both in his education and experience, as well as, in his particular opinion. Since the Court is required to accept the facts as set forth in those paragraphs due to the failure of the plaintiff to enter a

specific and meaningful denial. See HOUSEL versus THEODORIDIS, 324, Super., 597, an Appellate Division case from 1998.

Wherein the Court concluded that the non movant must set forth specific facts showing that there is a genuine issue for trial as his responsibility here. And in other words, the non movant, as the Court said, cannot sit on his or her hands and still prevail.

That having been said, I would also add to that question that would have to be reviewed if I had not determined that the doctrine of preemption applies, that there is essentially a concession in the expert testimony that if there was discussion going on between the witness and the plaintiff, there would be no need for the proposed alternative design. That's paragraph 42.

Again, under HOUSEL that fact is deemed admitted. And with that concession in the record, there's a substantial question in my mind whether or not the plaintiff could even avoid a summary judgment on that issue. However, since I've already ruled, there's no need for me to do it again.

I make that observation in passing so that the Appellate Division doesn't consider that I did not review that allegation, nor give it consideration. I certainly did. And had I found differently on the issue of preemption, I would have obviously completed my thinking on that issue and resolved the determination A or B, pro or con. But of course, that IS issue is now moot having ruled as I did.

The last issue,, which is also moot, is the responsibility of a component manufacturer. That issue is, again, moot based on my preemption determination. But frankly, that issue presents some of the same problems. I've already indicated that MICHALKO, 91, New Jersey, 386,

would be a sufficient basis upon which to consider liability of a component manufacturer.

But I've also determined that there's a necessity in order to address a component refit or component manufacturer, I should say, a rehabilitator, a refitter or an initial manufacturer of a component portion, and in this case it certainly was a component portion. There is a fundamental requirement that there is a breach of the duty owed to the foreseeable user by the component manufacturer to make the machine safe or to warn of the dangers inherent in its use.

That requirement would have to be met fundamentally. And then that issue would certainly present a meaningful issue for consideration. Again, so that no one thinks I ignored it, I find it to be moot as a result of the determination I made on the preemption doctrine. However, again, it presents a clear and distinct issue that if preemption had not applied, the Court would have been compelled to take a long and hard look at in order to determine a result.

Again, because the question is moot, I will not make a final determination on that issue other than to include the commentary that I have so that no one feels that perhaps that issue wasn't considered. It is not being resolved and it has not been forgotten, because it is now moot based on my ruling.

CERTIFICATION

I, CHRISTINE ORENA, Certified Agency Transcriber, do hereby certify that the foregoing transcript of proceedings on Tape No. CV-34-03, Index No. 2460 to 3273 is prepared in full compliance with the current

Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the decision as recorded in the matter of Armando Gonzalez and Mirna P. Gonzalez versus Ideal Tile Importing, Co., Inc., et al heard by the Monmouth County Superior Court on January 30, 2003.

/s/ Christine Urena

CHRISTINE URENA

TERRY GRIBBEN'S TRANSCRIPTION SERVICE

478

AOC Number

3/25/05

POWERED AND NONPOWERED INDUSTRIAL TRUCKS

GENERAL

This Standard is one of a series that has been formulated with the American Society of Mechanical Engineers as Sponsor in accordance with the Accredited Organization method, the procedures accredited by the American National Standards Institute, Inc., and the following scope.

Establishment of the safety requirements relating to the elements of design, operation, and maintenance; standardization relating to principal dimensions to facilitate interchangeability, test methods, and test procedures of powered and nonpowered industrial trucks (not including vehicles intended primarily for earth moving or over-the-road hauling); and maintenance of liaison with the International Organization for Standardization (ISO) in a matters pertaining to powered and nonpowered industrial trucks.

One purpose of the Standard is to serve as a guide to governmental authorities having jurisdiction over subjects within the scope of the Standard. It is expected, however, that the Standard will find a major application in industry, serving as a guide to manufacturers, purchasers, and users of the equipment.

For convenience, Standards for Powered and Nonpowered Industrial Trucks have been divided into separate volumes:

Safety Standards

- B56.1 Low Lift and High Lift Trucks
- B56.5 Guided Industrial Vehicles and Automated Functions of Manned Industrial Vehicles
- B56.6 Rough Terrain Forklift Trucks
- B56.7 Industrial Crane Trucks
- B56.8 Personnel and Burden Carriers
- B56.9 Operator Controlled Industrial Tow Tractors
- B56.10 Manually Propelled High Lift Industrial Trucks

Standardization Standards

- B56.11.1 Double Race or Bi-Level Swivel and Rigid Industrial Casters
- B56.11.3 Load Handling Symbols for Powered Industrial Trucks
- B56.11.4 Hook-Type Forks and Fork Carriers for Powered Industrial Forklift Trucks
- B56.11.5 Measurement of Sound Emitted by Low Lift, High Lift, and Rough Terrain Powered Industrial Trucks
- B56.11.6 Evaluation of Visibility From Powered Industrial Trucks
- B56.11.7 Liquefied Petroleum Gas (LPG) Fuel Cylinders (Horizontal or Vertical) Mounting – Liquid Withdrawal – for Powered Industrial Trucks

Safety standards that were previously listed as B56 volumes but now have different identification due to a change in standards development assignments are as follows.

- NFPA 505 Fire Safety Standard for Powered Industrial Trucks Type Designations, Areas of Use, Maintenance and Operation (formerly B56.2)

- UL 583 Standard for Safety for Electric - Battery -
 powered Industrial Trucks (formerly B56.3)
- UL 558 Standard for Safety for Internal Combustion
 Engine-Powered Industrial Trucks (formerly
 B56.4)

If adopted for governmental use, the references to other national standards in the specific volumes may be changed to refer to the corresponding governmental regulations.

The use of powered and nonpowered industrial trucks is subject to certain hazards that cannot be completely eliminated by mechanical means, but the risks can be minimized by the exercise of intelligence, care, and common sense. It is therefore essential to have competent and careful operators, physically and mentally fit, and thoroughly trained in the safe operation of the equipment and the handling of the loads. Serious hazards are overloading, instability of the load, obstruction to the free passage of the load, collision with objects or pedestrians, poor maintenance, and use of equipment for a purpose for which it was not intended or designed.

SAFETY STANDARD FOR LOW LIFT AND HIGH LIFT TRUCKS

ASME B56.1-2000

SAFETY STANDARD FOR LOW LIFT AND HIGH LIFT TRUCKS

PART I INTRODUCTION

1 SCOPE

This Standard defines the safety requirements relating to the elements of design, operation, and maintenance of low lift and high lift powered industrial trucks controlled by a riding or walking operator, and intended for use on compacted, improved surfaces.

2 PURPOSE

The purpose of this Standard is to promote safety through the design, construction, application, operation, and maintenance of low lift and high lift powered industrial trucks. This Standard may be used as a guide by governmental authorities desiring to formulate safety rules and regulations. This Standard is also intended for voluntary use by others associated with the manufacture or use of low lift and high lift powered industrial trucks.

3 INTERPRETATION

3.1 Mandatory and Advisory Rules

To carry out the provisions of this Standard, all items in Parts II, III, IV, and V are mandatory except those including the word *should*, which are recommendations.

3.2 Classification of Approved Trucks

The word *approved* means the classification or listing of trucks as to fire, explosion, and/or electric shock hazard by a nationally recognized testing laboratory, i.e., a laboratory qualified and equipped to conduct examinations and tests such as those prescribed by Underwriters Laboratories, Incorporated.

3.3 Requests for Interpretation

The B56 Committee will render an interpretation of any requirement of this Standard. Interpretations will be rendered only in response to a written request sent to the Secretary of the B56 Committee, ASME International, Three Park Avenue, New York, NY 10016-5990. The request for interpretation shall be in the following format.

- Subject:** Cite the applicable paragraph number(s) and provide a concise description.
- Edition:** Cite the applicable edition of the pertinent standard for which the interpretation is being requested.
- Question:** Phrase the question as a request for an interpretation of a specific requirement suitable for general understanding and use, not as a request for approval of a proprietary design or situation. The inquirer may also include any plans or drawings that are necessary to explain the question; however, they should not contain proprietary names or information.

ASME procedures provide for reconsideration of any interpretation when or if additional information that might affect an interpretation is available. Further, persons aggrieved by an interpretation may appeal to the cognizant ASME Committee or Subcommittee. ASME does not "approve," "certify," "rate," or "endorse" any item, construction, proprietary device or activity.

3.4 Metric Conversions

The values stated in metric units are to be regarded as the standard.

SAFETY STANDARD FOR LOW LIFT AND HIGH LIFT TRUCKS

ASME B56.1-2000

PART II FOR THE USER

4 GENERAL SAFETY PRACTICES

4.1 Introduction

4.1.1 Part II contains requirements for the users of powered industrial Trucks. Included are requirements for operator qualifications and training, operating safety rules, and maintenance practices.

4.1.2 Unusual operating conditions may require additional safety precautions and special operating instructions.

4.1.3 Supervision is an essential element in the safe operation of powered industrial trucks.

4.2 Modifications, Nameplates, Markings, and Capacity

4.2.1 Modifications and additions that affect capacity or safe operation shall not be performed without the manufacturer's prior written approval. Where such authorization is granted, capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

4.2.2 If the truck is equipped with a front-end attachment(s), including for extensions, the user shall see that the truck is marked to identify the attachment(s), show the approximate weight of the track and attachment

combination, and show the capacity of the truck with attachment(s) at maximum elevation with load laterally centered.

4.2.3 The user shall see that all nameplates and caution and instruction markings are in place and legible.

4.2.4 The user shall consider that changes in load dimension may affect truck capacity.

4.2.5 Fork extensions shall be designed for the application.

4.2.6 When modifications involve rebuild and repair of the basic unit, they shall be made in accordance with the manufacturer's established criteria and procedures (see para. 6.2).

4.2.7 Where steering must be accomplished with one hand using a steering handwheel, a steering knob(s) or equivalent shall be used to promote safe and effective operation. The steering handwheel and knob configuration shall be of a design that will minimize the hazard from a spinning handwheel due to a road reaction feedback, or the steering mechanism shall be of a type that prevents road reactions from causing the steering handwheel to spin. The steering knob(s) shall be within the periphery of the steering handwheel.

4.2.8 Where steering can be accomplished with either hand, and the steering mechanism is of a type that prevents road reactions from causing the handwheel to spin (power steering or equivalent), steering knobs may be used. When used, steering knobs shall be of a type that can be engaged by the operator's hand from the top, and shall be within the periphery of the steering handwheel.

4.2.9 Batteries used in electric trucks shall comply with the minimum/ maximum battery weight range shown on the truck nameplate.

4.3 Stopping Distance (Descending Grades)

4.3.1 When descending a grade, stopping distance will be greater than on-level operation. Methods shall be provided to allow for this condition. Some methods are: reduce speed, limit loads, allow adequate clear space at the bottom of the grade, etc. (see para. 5.3.8).

4.3.2 Approximate theoretical stopping distance for a dry clean asphalt, brushed concrete, or equivalent surface may be determined from the following formula:

$$s = \frac{0.394v^2}{D - G}$$

or

$$s_1 = \frac{3.34v_1^2}{D - G}$$

where

4.14 Trucks and Railroad Cars

4.14.1 When powered industrial trucks are driven on and off highway trucks or trailers, the brakes on the highway trucks or trailers shall be applied and wheel chocks or other positive mechanical means shall be used to prevent unintentional movement of highway trucks and trailers.

4.14.2 Provision shall be made to prevent railroad cars from being moved during loading and unloading. Wheel stops, hand brakes, or other recognized positive means shall be used to prevent movement during loading and unloading.

4.14.3 Whenever powered industrial trucks are driven on and off semitrailers not coupled to a tractor, supports may be needed to prevent upending or corner dipping.

4.14.4 Maintain a safe distance from the edge of ramps, platforms, or other similar working surfaces.

4.14.5 Do not move railroad cars or trailers with a powered industrial truck unless the truck is properly designed and equipped for that operation.

4.15 Warning Device

4.15.1 Every truck shall be equipped with an operator-controlled horn, whistle, gong, or other sound-producing device(s).

4.15.2 The user shall determine if operating conditions require the truck to be equipped with additional sound-producing or visual (such as lights or blinkers) devices, and be responsible for providing and maintaining such devices.

4.16 Relocating Powered Industrial Trucks

When utilizing lifting equipment such as elevators, cranes, ship hoisting gear, etc., to relocate a powered industrial truck, the user shall ensure that the capacity of the hoisting equipment being used is not exceeded.

4.17 Elevating Personnel

4.17.1 Only operator-up high lift trucks have been designed to lift personnel. If a work platform is used on trucks designed and intended for handling materials, the requirements of paras. 4.17.2 and 4.17.3 shall be met for the protection of personnel.

4.17.2 Whenever a truck is used to elevate personnel, the following precautions for the protection of personnel shall be taken:

(a) comply with the design requirements in para. 7.36 of this Standard;

(b) provide protection for personnel in their normal working position on the platform from moving parts of the truck that represent a hazard;

(c) be certain that required restraining means such as railings, chains, cable, body belt(s) with lanyard(s), or deceleration devices, etc., are in place and properly used;

(d) be certain that the lifting mechanism is operating smoothly throughout its entire lift height, both empty and loaded, and that all lift limiting devices and latches, if provided, are functional;

(e) provide overhead protection as indicated to be necessary by the operating conditions;

(f) replace any body belt, lanyard, or deceleration device that has sustained permanent deformation or is otherwise damaged.

4.17.3 Whenever a truck is equipped with a work platform (does not include operator-up high lift trucks), precautions specified in para. 4.17.2 shall be taken and the following additional precautions shall be taken for the protection of personnel:

(a) provide a platform that complies with the design requirements in para. 7.36.3;

(b) the platform attachment means are applied and the platform is securely attached to the lifting carriage or forks;

(c) when the lifting carriage and/or forks are supporting the platform used to elevate personnel, the lifting carriage and/or forks are secured to prevent them from pivoting upward;

(d) the mast is vertical — do not operate on a side slope;

(e) the platform is horizontal and centered and not tilted forward or rearward when elevated;

(f) the truck has a firm and level footing;

(g) place all travel controls in neutral and set parking brake;

(h) before elevating personnel, mark area with cones or other devices to warn of work by elevated personnel;

(i) lift and lower personnel smoothly, with caution, and only at their request;

(j) avoid overhead obstructions and electric wires;

* * *

**In The
Supreme Court of the United States**

ARMANDO GONZALEZ and
MIRNA PADILLA GONZALEZ,

Petitioners,

v.

KOMATSU FORKLIFT U.S.A., INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of New Jersey**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

Does the saving clause in the Occupational Safety and Health Act of 1970 preserve tort claims premised on a theory of liability in conflict with an existing and applicable Occupational Safety and Health Administration regulation?

LIST OF PARTIES

Respondent is Komatsu Forklift U.S.A., Inc.

Petitioners are Armando Gonzalez and Mirna Padilla Gonzalez

Other parties to the proceeding in the Supreme Court of New Jersey:

Ideal Tile Importing Co., Inc.

Kalmar-AC of Columbus, Inc.

Kalmar-AC Handling Systems, Inc.

Lift Trucks, Inc.

Henson Truck & Forklift Service

CORPORATE DISCLOSURE STATEMENT

Komatsu Forklift U.S.A., Inc. is a wholly owned subsidiary of Komatsu Forklift Company, Ltd.

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STATEMENT OF THE CASE

Petitioners brought this action in the Superior Court of New Jersey for Monmouth County, seeking damages for injuries suffered by Armando Gonzalez in a workplace accident. The accident instrumentality was a forklift. It had been driven, in reverse, directly into Mr. Gonzalez, by one of his co-workers. Petitioners blamed the accident on the forklift, claiming that the absence of one or more automatic signaling devices rendered it defective in design.¹

Following the close of discovery, Respondent filed a motion for summary judgment, based in part on the preemptive effect of an Occupational Safety and Health Administration (OSHA) regulation. The regulation incorporated an American National Standards Institute (ANSI) requirement for signaling devices on industrial trucks:

All new powered industrial trucks acquired and used by an employer after the effective date specified in paragraph (b) of Sec. 1910.182 shall meet the design and construction requirements for powered industrial trucks established in the "American National Standard for Powered Industrial Trucks, Part II, ANSI B56.1-1969," which is incorporated by reference as specified in Sec. 1910.6, except for vehicles intended primarily for earth moving or over-the-road hauling.

¹ Petitioners' identification of Respondent as "the manufacturer" of the forklift is not entirely accurate. Petition i. Manufacture occurred in stages, and involved three entities, Respondent being the first in line and Kalmar-AC Handling Systems, Inc., also a party to the proceedings in New Jersey, being the last.

29 C.F.R. § 1910.178(a)(2). The referenced requirement called for "a warning horn" or other similar device. USAS B56.1-1969, 427.²

By the time of this forklift's final assembly, the standard had been renumbered and reworded, but with respect to warning devices remained conceptually the same. The required "sound-producing" warning device was described as "operator controlled." ANSI B56.1-1983, 4.15.1. Advisability of automatic warning devices was dependent upon the forklift user's assessment of operating conditions:

The user shall determine if operating conditions require the truck to be equipped with additional sound-producing or visual (such as lights or blinkers) devices, and be responsible for providing and maintaining such devices.

Id., 4.15.2.

Respondent argued in its motion that the OSHA regulation's incorporation of B56.1 established the preeminence of that standard's underlying concept. Because forklifts are used in varied workplace environments, they are not a one-size-fits-all commodity, and automatic signaling devices effective in one environment may be quite ineffective in another. With many types of devices available, which, if any, would be right for a given workplace environment is a matter best left to those familiar with that environment, and forklift manufacturers are not among them.

The court agreed with Respondent, finding Petitioners' claim pre-empted. Petitioners appealed. The Superior Court's Appellate Division affirmed with one dissenting

² ANSI was then called the USA Standards Institute.

vote, providing Petitioners an appeal as of right to the Supreme Court of New Jersey, where on July 27, 2005, the judgment was again affirmed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioners' basic premise is that the Supreme Court of New Jersey has broken new ground. The decision to uphold the pre-emption of their tort claim is said to have "erroneously extended" this Court's decision in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), and in the process to have "mistakenly altered the balance between state and federal authority" and "distort[ed] the separation of powers among the three branches of State government." Petition 12, n.2, and 13. The decision did nothing of the kind. It represents nothing more than a routine application of accepted principles previously announced by this Court, and so warrants no attention from this Court.

That Congress intended for the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* (OSH Act), to have some pre-emptive effect is not open to question. The issue was settled in *Gade*, and while *Gade* concerned state legislation, not state common law, Petitioners' assertion that the OSH Act's "saving clause" evinces a congressional willingness to carve out a tort claim exception does not raise a novel issue either. This Court has addressed the argument that a "saving clause" forecloses pre-emption of tort claims on more than one occasion:

[T]his Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so

would upset the careful regulatory scheme established by federal law." We find this concern applicable in the present case. And we conclude that the saving clause foresees – it does not foreclose – the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts.

Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 870 (2000) (quoting *United States v. Locke*, 529 U.S. 89, 106-107 (2000)) (other citations omitted).

The Supreme Court of New Jersey merely recognized the concern referenced in *Geier*. Just as the federal regulatory scheme addressing the risks facing motorists would have been upset by permitting "no air bag" claims to go forward, the issue here was whether the federal regulatory scheme addressing the risks facing workers would be upset by permitting "no automatic alarm" claims to go forward.

The problem called for a pure conflict analysis, requiring a determination of whether application of the common law would interfere with the congressional objective furthered by application of the OSHA regulation. The Supreme Court of New Jersey decided it would, concluding that Petitioners' claim, of a type which if successfully pursued would lead manufacturers to equip their forklifts with every automatic signaling device imaginable, conflicts with the OSHA requirement that users determine if automatic signaling devices are a benefit, or a detriment, to the safety of their workplace.³

³ "The argument against indiscriminate use of additional alarms is that it might encourage the driver to ignore his responsibility of looking in the direction of travel and being alert to impending danger. Also,

(Continued on following page)

Petitioners' predictions of dire consequences have no basis in reality. The question posed here was narrow in scope, and the Supreme Court of New Jersey provided a suitably narrow response: "Although a state tort action involving a third party and a workplace injury could survive an OSHA conflict analysis, this one simply does not." App. 11a. That does not provide immunity for "every non-employer who causes tortious injury to an employee." Petition 11. It provides immunity for forklift manufacturers who are blamed for a limited number of workplace accidents. The manufacturers are protected against liability only for injuries allegedly caused by the lack of an automatic signaling device that their customers, in compliance with OSHA regulations, decided did not further the federal objective of achieving safety in the workplace.

Petitioners' contention that "[t]he New Jersey Supreme Court has decided this federal question in a manner that conflicts with decisions of other state courts" is just wrong. Petition 10-11. Not one state court decision cited by Petitioners even addresses pre-emption, and the fact that not one state court decision cited by Petitioners was "mentioned in the *Gade* opinions" is a fact to which no significance can possibly attach. Petition 16. Every one of those decisions post-dated issuance of the *Gade* opinions.

Pre-emption of Petitioners' claim is simply not an unwarranted extension of *Gade*. It is a result that flowed directly from existing precedent. This Court determined in *Gade* that the OSH Act pre-empts conflicting regulatory

automatic continuous alarms can become so commonplace that they will soon be ignored by persons in the area." ANSI/ASME B56.1-1983, Interpretation: 1-6.

efforts by the States. This Court reaffirmed in *Geier* that tort liability is regulatory in effect, and is subject to pre-emption, notwithstanding the existence of a statutory provision "saving" common law claims.

With the applicable federal regulation mandating user control over the choice of automatic signaling devices for industrial trucks, and the imposition of tort liability effectively eliminating that control, the conflict was, and is, apparent. As a result, pre-emption was, and is, appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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Dated: November 22, 2005